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September 1, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 04-33 – Verizon's Petition for Arbitration

Dear Ms. Cottrell:

Verizon Massachusetts ("Verizon MA") is responding to the Department's August 23rd procedural notice requesting comments regarding the effect of the Federal Communications Commission's ("FCC") *Interim Rules Order*[1] on this arbitration, as well as Verizon MA's Notice of Withdrawal of Petition for Arbitration as to Certain Parties. As discussed below, the *Interim Rules Order* explicitly approves change-of-law proceedings, like this one, and emphasizes the need to quickly conclude this arbitration to assure prompt implementation of the FCC's final unbundling rules. This arbitration should go forward with the carriers Verizon MA has designated as remaining in the arbitration; the *Interim Rules Order* does not affect Verizon MA's Notice withdrawing particular competitive local exchange carriers ("CLECs") from this proceeding.

Verizon MA initiated this consolidated arbitration in February 2004 to amend its interconnection agreements to reflect the *Triennial Review Order*'s changes in

[1] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, released August 20, 2004 ("*Interim Rules Order*").

unbundling obligations,[2] to the extent those changes were not self-effectuating.[3] The FCC has clearly mandated the prompt implementation of its rulings. Attempts by CLECs to use the *Interim Rules Order* for delay should not be sanctioned by the Department.

In fact, the *Interim Rules Order* confirms that there has *never* been any legitimate basis for the CLECs' attempts to block amendments reflecting the *TRO* rulings. The "transitional" unbundling obligations imposed by the *Interim Rules Order* apply only to the UNEs eliminated by the *USTA II* mandate, and do *not* affect any of the *TRO* rulings that were either affirmed in *USTA II* or not challenged on appeal. These decisions include, among others, the FCC's elimination of unbundling requirements for all enterprise switching,[4] OCn loops and transport, and packet switching; and its

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2 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

3 On August 20, 2004, Verizon MA filed a Notice for Withdrawal of its Petition for Arbitration as to certain CLECs whose interconnection agreements already contain specific terms permitting Verizon MA, upon specified notice, to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Thus, those agreements need not be amended to implement Verizon MA's contractual right to cease providing UNEs that were eliminated by the FCC's *Triennial Review Order* or the D.C. Circuit's *USTA II* decision. *See* Verizon MA's Notice of Withdrawal, at 2. Even as to the agreements of CLECs that remain in the arbitration, amendments may well not be required; Verizon MA does not, by proceeding with arbitration, waive the right to argue that the issuance of the mandate in *USTA II* did not constitute a "change of law" under the terms of the parties' agreements. Nor does Verizon MA waive the argument that it cannot be required under its agreements with the CLECs in the arbitration to continue to provide UNEs eliminated by the *TRO* or *USTA II*. This arbitration should nevertheless proceed as to those CLECs in order to eliminate any doubt regarding Verizon MA's right to cease providing such facilities on an unbundled basis.

4 The FCC made clear that its interim rules do not apply to any enterprise switching; all of the *Interim Rules Order*'s "references to unbundled switching encompass mass market local circuit switching," as distinct from enterprise switching. *Interim Rules Order*, at ¶ 1 n.3. Under the *Triennial Review Order*, the enterprise market (*i.e.*, the market where competitors are not impaired without UNE access to circuit switching) includes customers served by one or more DS1 or higher capacity loops, as well as "customers taking a sufficient number of multiple DS0 loops." *Triennial Review Order*, at ¶ 497. In the latter regard, the FCC affirmed its determination from the *UNE Remand Order* that the dividing line between mass market and enterprise customers "will be four lines" located in specific wire centers comprising federal density zone one in the top 50 Metropolitan Statistical Areas ("MSA"). *Id*. at ¶¶ 497, 525. Accordingly, the FCC in its *Triennial Review Order* promulgated regulations declaring that ILECs "shall comply with the four-line 'carve-out' for unbundled switching established in" the *UNE Remand Order*. 47 C.F.R. § 51.319(d0(3)(ii). Because the D.C. Circuit in *USTA II* vacated the FCC's delegation to the states to determine the cross-over point between mass-market and enterprise customers, only the FCC (and not state commissions) have the authority to change this cross-over point.

determination that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-premises facilities are not subject to unbundling.[5]

The FCC's interim rules purport to impose "transitional" unbundling obligations only with respect to those UNEs affected by the *USTA II* mandate - *i.e.*, mass market switching, high capacity loops, and dedicated transport. Specifically, incumbent local exchange carriers ("ILECs") must provide these items under the rates, terms, and conditions that applied under their interconnection agreements as of June 15, 2004. This obligation will continue until the earlier of the effective date of final unbundling rules or six months after Federal Register publication of the *Interim Rules Order*. *Interim Rules Order*, ¶ 1. The FCC has also proposed a six-month transition following the interim period, to the extent that the FCC has not issued new permanent unbundling rules before the interim requirements expire. *Id*. at ¶ 29.

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[5] In fact, Verizon MA has already amended D.T.E. MA Tariff No. 17 to remove several unbundling requirements eliminated by the FCC. In its October 3, 2003, filing (Tariff Transmittal No. 03-87), Verizon MA filed tariff revisions to eliminate dark fiber channel terminations, OCn and Synchronous Transport Signal – Level 1 ("STS1") interoffice transport offerings, and the high frequency portion of the copper loop ("HFPL") as UNEs, and to grandfather existing line sharing arrangements. Those tariff revisions became effective, as filed, on November 1, 2003.

The Department, however, suspended Verizon MA's proposed revisions filed on June 23, 2004, to remove unbundled access to local circuit switching to serve enterprise customers, which includes local circuit switching subject to the FCC's Four-Line Carve-Out Rule or used to serve customers over DS1 or higher capacity loops, as well as the associated Shared Transport. D.T.E. 04-73, *Suspension Order*, at 2 (July 23, 2004). The Department should promptly lift that suspension because it conflicts with federal unbundling requirements and is preempted under federal law. As the FCC confirmed in its *Interim Rules Order*, there are no unbundling requirements, transitional or otherwise, for enterprise switching (which includes the Four-Line Carve-Out Rule). *Interim Rules Order*, at ¶ 1 n.3.

Moreover, suspension of those proposed tariff changes is inconsistent with the Department's own findings in D.T.E. 03-59, where the Department: (1) declined to seek a waiver of the FCC's finding in the *Triennial Review Order* that there is no impairment for enterprise switching; (2) ruled that, to the extent Verizon MA must continue to offer enterprise switching, it is pursuant to Section 271 of the 1996 Act; and (3) held that it lacked the authority to enforce Verizon MA's Section 271 obligations. *See* D.T.E. 03-59, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops*, Order Closing Investigation, at 20 (November 25, 2003); D.T.E 03-59-A, Order Denying Motion of DSCI Corporation and InfoHighway Communications Corporation for Partial Clarification and Reconsideration of Order Closing Investigation, at 7-8 (January 23, 2004). While these proceedings specifically focused on the FCC's finding of no impairment for enterprise switching used to serve customers served by DS1 or higher capacity loops, the Department has previously recognized that customers covered by the Four-Line Carve-Out Rule also fall within the scope of the enterprise market identified by the FCC. *See* D.T.E 03-59, Vote and Order to Open Proceeding, at 4 (August 26, 2003) ("enterprise customers are those served via DS1 or above, as well as those customers in density zone one of the top 50 metropolitan serving areas ('MSAs').").

The FCC has made it clear that these transitional obligations do *not* affect Verizon MA's rights to proceed with this arbitration. To the contrary, the *Interim Rules Order* explicitly encourages such proceedings, in order to assure a "speedy transition" to any permanent rules definitively eliminating unbundling requirements for the UNEs at issue. In that regard, the FCC has "expressly preserve[d] incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements." *Interim Rules Order*, at ¶ 22. These proceedings are to

> *presume the absence of unbundling requirements* for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime . . .Thus, whatever alterations are approved or deemed approved by the relevant state commission may *take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order.

Id. at ¶ 23 (emphasis added; footnotes omitted).

Indeed, this arbitration is exactly the kind of mechanism the FCC contemplated in its *Interim Rules Order* to ensure a swift transition to any new regime. Consistent with this objective, this arbitration should move forward promptly and conclude by the six-month deadline the FCC has established for adoption of its final rules.

The *Interim Rules Order* does not affect Verizon MA's notice withdrawing its arbitration petition as to particular CLECs. As Verizon MA explained in its Notice of Withdrawal, most of its interconnection contracts permit discontinuation, upon notice, of UNEs Verizon MA no longer must provide under Section 251(c)(3) of the Act. Thus, there is no need to negotiate or arbitrate amendments to give Verizon MA a right that it already has under these agreements. As noted, the *Interim Rules Order* does not affect the UNEs already delisted under the *TRO* rulings, so, with regard to the carriers dismissed from the arbitration, Verizon MA will continue to exercise its contractual rights to discontinue those services. As to the UNEs affected by the *USTA II* mandate, Verizon MA will continue providing these services to the dismissed carriers on an interim basis under the rates, terms, and conditions in their interconnection agreements as of June 15, 2004, as the *Interim Rules Order* requires.

The carriers that remain in the arbitration have contracts that may appear to require amendment before Verizon MA may discontinue UNEs it no longer has any legal obligation to provide. Verizon MA filed its proposed contract amendment with its petition on February 20, 2004, well before the interim rules were released. Because the FCC has directed that the results of change-of-law proceedings "must reflect the transition regime" set forth in the *Interim Rules Order*, Verizon MA will need to modify

that proposal to reflect the interim rules. Verizon MA will file that modified amendment no later than September 14, 2004, along with a proposed arbitration schedule.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

/s/Barbara Anne Sousa

Barbara Anne Sousa

cc: Tina Chin, Esquire, Hearing Officer
Michael Isenberg, Esquire, Director – Telecommunications Division
April Mulqueen, Assistant Director – Telecommunications Division
Paula Foley**,** Assistant General Counsel
D.T.E. 04-33 Service List